

# STEPTOE & JOHNSON<sup>LLP</sup>

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## **VIA ELECTRONIC FILING**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re:** Notice of *Ex Parte* Presentation -- *In the Matter of Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Notice of Proposed Rulemaking, MB Docket No. 05-181

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, EchoStar Satellite L.L.C. ("EchoStar") submits this letter to report that on Friday, July 29, 2005, representatives of EchoStar had a telephone discussion with Ms. Catherine Bohigian, Senior Legal Advisor to Chairman Martin, regarding satellite carriage of digital broadcast signals in noncontiguous states under Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004.

EchoStar's representatives reiterated the view, expressed in EchoStar's comments in the above-referenced proceeding, that interpreting Section 210 to impose a multicast requirement would render the provision constitutionally infirm. Specifically, a multicast requirement would not advance any recognized important governmental interests, as required by the intermediate scrutiny test articulated in *U.S. v. O'Brien*, 391 U.S. 367 (1968) and the *Turner* cases.<sup>1</sup> Moreover, the burden imposed by a multicast obligation would not be congruent to any benefits obtained, as is also required

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<sup>1</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) and *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding cable must-carry rules as furthering the important governmental interests of preserving the benefits of free over-the-air broadcast television for viewers and promoting the dissemination of information from multiple sources).

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under *O'Brien*.<sup>2</sup> Indeed, the burden associated with a multicast requirement would be particularly onerous, as carriage of multicast signals would limit satellite operators' ability to utilize statistical multiplexing, an integral part of the compression process that helps squeeze more channels out of the limited spectrum allocated to satellite operators.

Neither should the Commission interpret Section 210 to impose a multicast obligation based on Congress's use of the plural term "signals" rather than "signal" in Section 210.<sup>3</sup> Section 210 also uses the plural in directing that the "*signals* originating as *analog* signals of each television broadcast station" be carried. Since analog stations do not multicast, it follows that a more reasonable interpretation of "signals" is that it refers to the signals of the multiple *stations* to be carried, not multiple signals of individual stations. Thus, use of the plural term "signals" cannot plausibly be taken as a direction from Congress that multicasting is required.

EchoStar's representatives also reiterated EchoStar's position that Section 210 was intended by Congress to apply only to Alaska and Hawaii.

As required by Section 1.1206(b)(2) of the Commission's Rules, one copy of this notice is being filed electronically in the above-referenced docket.

Respectfully submitted,

/s/

Pantelis Michalopoulos  
Counsel for EchoStar Satellite L.L.C.

cc: Ms. Catherine Bohigian (via electronic mail)

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<sup>2</sup> See *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FC 05-27 (rel. Feb. 23, 2005), ¶¶ 14-15 (discussing *O'Brien*).

<sup>3</sup> The Notice of Proposed Rulemaking in this proceeding posits that Section 210's reference to retransmission of the "signals" of "each such station" in a market must refer to more than one programming stream, that is, the multicast digital signals from each station. See *Implementation of Section 210 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, FCC 05-92, Notice of Proposed Rulemaking, MB Docket No. 05-181 (rel. May. 2, 2005), ¶ 9.